IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MRS. JUSTICE K.HEMA

TUESDAY, THE 6TH NOVEMBER 2007 / 15TH KARTHIKA 1929

CRL.A.No. 1328 of 2006()

SC.327/2003 of ADDL. SESSIONS COURT (ADHOC-I), THODUPUZHA
CP.1/2003 of JUDL. MAGISTRATE OF FIRST CLASS COURT,
NEDUMKANDOM

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APPELLANT: ACCUSED

JOSEPH @ SUNNY, AGED 26 YRS,
S/O. MATHEW, POOVATHOLIKKUDIYIL VEEDU,
MAVARA CITY KARA, UDUMBANCHOLA VILLAGE.

BY ADV. SRI.PEEYUS A.KOTTAM
SRI.S.DILEEP (KALLAR)
SRI.KURIAN JOSEPH (ARAKKUNNAM)
SRI.NAVEEN THOMAS
SRI.KRISHNA PRASAD

RESPONDENTS: COMPLAINANT

STATE OF KERALA, REPRESENTED BY THE
PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.K.C.SANTHOSH KUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 06/11/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.B.KOSHY & K.HEMA, JJ.

Crl.A.No.1328 OF 2006

Dated 6th November, 2007

JUDGMENT

Koshy,J.

Appellant was found guilty for offences punishable under Section 302 of the Indian Penal Code and section 3 read with section 25 (1-B) of the Arms Act. According to the prosecution, the family members of the accused and deceased were engaged in collecting sand. With regard to the collection of sand they had picked up quarrels at different locations and the two groups were having enmity with each other. Out of that enmity at 7.25 a.m. on 5.5.2000 deceased, his brothers and friends with chopper, sword, knife and lathies chased away the accused and his brother Mamachan and accused ran away and escaped. The assailants pursued Mamachan, caught hold of him and by cutting, stabbing and beating voluntarily caused hurt to him and attempted to kill him. Seeing this, the accused taking the loaded country gun (MO5) kept in his house with the intention of murdering the deceased at the culvert area of the Kuthumkal-Chemmannar Panchayat mud road in Kanthipara Village fired a shot and thereby inflicted injuries on the deceased and the deceased succumbed to the injuries on the way to the hospital. Hence the accused has committed the above offence. The MO5 gun was not having any licence. The accused denied the incident.

2. Ext.P1 F.I. Statement was given by PW1. He did not see the incident which culminated in the death of the deceased. He had only hearsay knowledge regarding the incident. PWs 2, 3, 4, 6 and 17, brothers of the deceased, who were examined as occurrence witnesses turned hostile and in their evidence they contradicted their alleged 161 statement given to the police and their evidence is not at all helpful to the prosecution. PW7 who was examined as an independent occurrence witness also turned hostile. PW15 was examined as an occurrence witness, but, he also turned hostile. He was an accused in the counter case. PW5 and PW16 are only attestors to the inquest report and PW8 is only an attestor to the scene mahazar. PW9 is attestor to recovery of the dress by the police. PW10, Clerk, Arms Section, only stated that he was asked to take legal action by the Collector regarding the use of unlicenced fire arm. PW11 Village Officer prepared site plan. PW12 recorded the F.I. Statement given by PW1 and registered Ext.P12 F.I.R. PW13 Circle Inspector of Police laid the charge-sheet. PW14 doctor conducted autopsy and issued Ext.P13 certificate and certified that the death was due to gun shot. Five metallic pellets recovered from injury Nos.1 to 5 were handed over to the constable in a sealed packet. PW18 was the Investigating Officer. He deposed that there was a counter case S.C.No.116/2005 registered for attacking accused and

his brother Mamachan by the deceased, his brothers and friends. There is no dispute regarding the identify of the accused or deceased. There is no other evidence except recovery of the gun and blood stained clothes of accused recovered as per the alleged confession of the accused to connect the accused with the crime.

3. Investigating Officer deposed that on the basis of Ext.P16(a) confession statement MO5 gun was recovered from the midst of grass. Similarly on the basis of Ext.P9(a) confession statement of the accused, his dhoti and shirt were recovered as per Ext.P9 mahazar. Shirt and dhoti are MO6 series which together with cotton gauze dried with the blood of deceased (MO2), blood stained soil taken from the place of occurrence etc. were sent to Forensic Science Laboratory and Ext.P18 report was obtained which shows that MO6 series shirt and item No.5 lunki of accused contained blood belonging to `B' group. MO2 cotton gauze also contained `B' group blood. Even though all the occurrence witnesses turned hostile, based on the recovery, conviction was entered into by the trial court. It is true that motive is proved, but, mere existence of motive itself cannot lead to conviction. (See **State of M.P.** v. **Paltan Mallah and others** ((2005) 3 SCC 169). It was also proved by medical evidence that the deceased died due to gun shot and according to the prosecution, the gun was recovered on the basis of the confession

given by the accused. But, it is pertinent to note that Ext.P17 Forensic Science Laboratory Report shows that no shot was fired from the gun even though the gun recovered was serviceable. The following observations were given in Ext.P17:

> "1. The weapon concerned in this case is a serviceable SBML firearm.
>
> 2. Signs of firing could not be detected inside the barrel of the weapon."

In the report it is also stated that on examination of the barrel, no compounds of nitrite were found. Even though MO1 series five pellets were recovered from the body of the deceased, there is no evidence that the above pellets can be fired from MO1 gun. It is also pertinent to note that the mahazar witness regarding recovery of gun was not examined. Usually recovery evidence is considered only as a corroborative evidence to corroborate other indirect or direct evidence. Generally evidence admissible under Section 27 of the Evidence Act is only one of the circumstances in addition to other evidence adduced by the prosecution to prove the guilt. It provides a guaranty to the correctness of the version of the prosecution. When recovery evidence is taken as the sole evidence to connect the accused with the crime, it should be proved clearly. Here, even if the gun was recovered at the instance of the accused, there is no evidence to show that the pellets were fired from that gun and the

gun was used earlier. There is no evidence to show that the gun was belonging to the accused and, therefore, recovery of the gun is artificial and that cannot lead to conviction of the accused. Another recovery relied on by the prosecution is the recovery of the dress (shirt and lunki) owned by the accused, which were stained with blood with the same group of blood (B+ve) as that of the deceased. But, if the prosecution story is believed, there is no scope for staining the dress of the accused with the blood of the deceased as according to the prosecution the deceased, his brothers and friends were chasing the accused and his brother Mamachan. Accused ran away. The deceased caught hold of Mamachan and assaulted him and seeing that the accused took the gun from the house and fired. He was standing in his compound. In between there was a road and the deceased and party were standing on the other side of the road. If that be so, even though the accused has fired, there is no chance that shirt and lunki of the accused will be stained with blood of the deceased. Therefore, that recovery is also artificially created by the prosecution for the purpose of the case or the story which the prosecution is stating is not correct. When the evidence of the recovery becomes doubtful, on the basis of the sole evidence of recovery, the accused cannot be punished. There is no other evidence against the accused. In the above circumstances, we are of the view that there is absolutely no evidence against the accused. In any event, the case against the

accused was not proved beyond reasonable doubt and he is entitled to acquittal. In the result, the conviction and sentence passed against the accused are set aside and accused should be set free forthwith, if he is not required in any other case.

The appeal is allowed.

J.B.KOSHY
JUDGE

K.HEMA
JUDGE

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